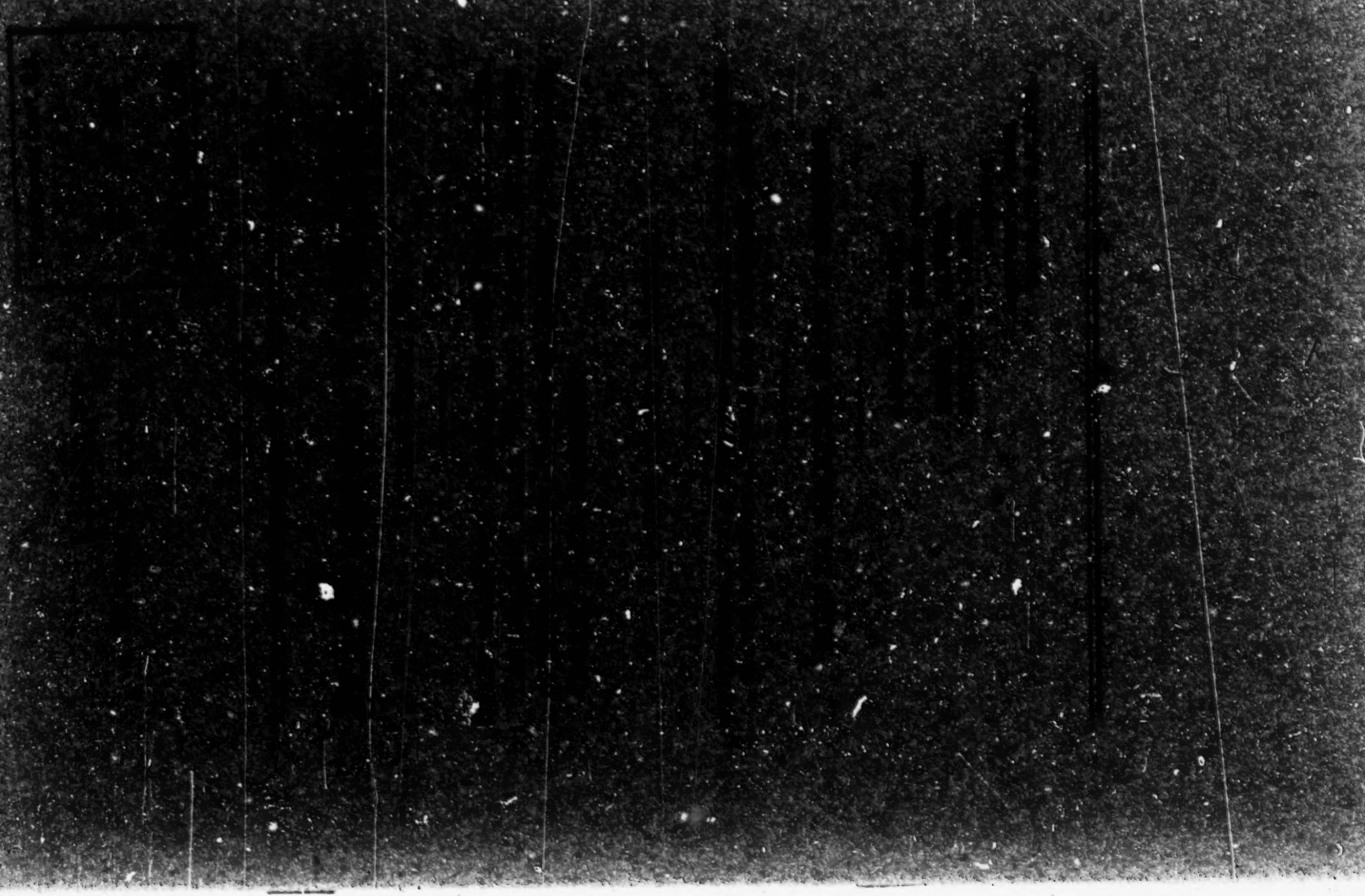

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747-028—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 401

STATE OF SOUTH DAKOTA, GAME, FISH AND PARKS DEPARTMENT, IZAAK WALTON LEAGUE, BOY SCOUTS OF AMERICA, GIRL SCOUTS OF AMERICA, AND PIERRE COUNTRY CLUB, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A8) is reported at 329 F. 2d 665.

JURISDICTION

The judgment below was entered on April 8, 1964 (Pet. App. A9). A timely petition for rehearing *en banc* was denied on May 19, 1964. The petition for certiorari was filed on August 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below correctly held that, upon the condemnation by the United States of a public park owned by the State of South Dakota, the proper measure of just compensation is the fair market value of the property, rather than the cost of replacing the property with an identical facility.

STATEMENT

This case involves the condemnation of some 850 acres of land in South Dakota in connection with the Big Bend Reservoir Project. The land, commonly known as Farm Island, has long been used as a public park.[1] Although originally an island in the Missouri River, it has been connected at both ends to the mainland by fill and accretion.

At the trial, the government's expert witness testified as to the market value of the property. He took into account the sales of other nearby land, including islands (R. 240–245, 248–252), and the reproduction cost less depreciation of the improvements, including a nine-hole golf course (R. 239). His estimate of market value was $386,900, an amount which, in his view, coincided with the cost of a substitute facility.

The witnesses for South Dakota, eschewing the market value approach, testified instead to the cost which the State would incur in exactly duplicating Farm Island. Their estimates of land value, and also of reproduction cost less depreciation of the buildings

[1] As set forth in the opinion of the court of appeals (Pet. App. A2–A3), the land was donated to South Dakota by the United States in 1889 to use for park purposes and could not be sold.

and golf course, were substantially the same as the government's. However, they arrived at estimates of $1,585,000 to $1,678,000 (R. 55, 138) by including such items as $811,000 for a dike and breakwater which had been built by the Civilian Conservation Corps in the 1930's (R. 31–32, 82–83); $337,000 to construct, and $360,000 to operate, an irrigation system on the substitute site which would duplicate Farm Island's ground water table so that identical trees could grow (R. 98–99, 114, 178); $171,300 for planting identical trees (R. 178–179); and $113,000 to construct, on the substitute facility, a lake with a plastic bottom to provide swimming and boating facilities comparable to those available on Farm Island (R. 118).

The district court ruled that the highest and best use of the land was for park purposes and that just compensation must be based upon the cost of replacing the property with a physically identical substitute facility. The jury returned a verdict of $1,062,250 (R. 286), upon which judgment was entered (R. 10). The court of appeals reversed, holding (Pet. App. A7):

> We do not believe, after a careful review of the record, that there was need or justification for a departure from the concept of market value as the standard of just compensation in Federal eminent domain cases and conclude that its submission on a substitute site theory was prejudicial error which requires us to reverse.

ARGUMENT

1. The decision of the court of appeals, adhering to market value as the proper measure of compensation, is plainly correct. This Court has repeatedly held

fair market value is the measure of just compensation in federal eminent domain cases. See, *e.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, and *Olson v. United States*, 292 U.S. 246. And the normal market value standard has been held applicable to the condemnation of park property. *Westchester County Park Commission v. United States*, 143 F. 2d 688 (C.A. 2), certiorari denied, 323 U.S. 726.

Petitioners attempt (Pet. 16-25) to bring Farm Island within the one recognized exception to the market value concept, *i.e.*, the rare situation in which the property (*e.g.*, roads, bridges, sewers), by its very nature, has no market and hence no market value, but in which the public authority will be required to expend funds to replace the condemned facility or function. In such cases "just compensation" is the cost of a necessary substitute facility. But Farm Island, like any other tract of land, had a market value readily ascertainable through the application of normal appraisal methods. To be sure, it might have been difficult for the State to find a private buyer who wished to use Farm Island as a park. Perhaps, too, the highest amount which the property would bring on the open market would be somewhat less than the State has invested in it or would be prepared to invest in

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See, *e.g.*, *Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786 (C.A. 4); *Town of Clarksville, Va. v. United States*, 198 F. 2d 238 (C.A. 4), certiorari denied, 344 U.S. 873; *United States v. State of Arkansas*, 164 F. 2d 943 (C.A. 8), cited by petitioners; and *City of Fort Worth, Tex. v. United States*, 188 F. 2d 217 (C.A. 5); *State of Washington v. United States*, 214 F. 2d 33 (C.A. 9), certiorari denied, 348 U.S. 862. Cf. *Bauman v. United States*, 263 U.S. 78.

a substitute facility. The fact remains, however, that the land did have a market and therefore a market value, and that the government, as condemnor, is required to pay no more than a willing buyer would pay for the property with a view to its most profitable use. The measure of just compensation is not the special and peculiar value which the property has for the condemnee, as evidenced by the amount he would spend to replace it, but the value it has for potential purchasers. Thus, while such features of Farm Island as its accessibility (which it owes to the dam and breakwater), the high water table, the trees, and the swimming and boating facilities are highly relevant to a determination of just compensation, they are compensible only insofar as they enhance, and thus are reflected in, the fair market value of the property. This is a question which the jury should have been permitted to consider.

Petitioner urges that the other properties upon whose sales the government's witness relied were not comparable to Farm Island. We disagree. But in any event, the extent to which the other properties were comparable, and the amount, if any, by which the prices paid for those properties required adjustment to take into account special advantages enjoyed by Farm Island, were questions which should have been considered within the framework of the market value approach.

We note, finally, that the condemnation award could not properly be defended on the basis of the alleged historic importance of Farm Island. For petitioner presented no evidence and made no suggestion in the

condemnation proceedings that the property was valuable as a historic site. And there is no reason to suppose that the jury's award attributed any value to Farm Island on this ground.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for certiorari should be denied.

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OCTOBER 1964.

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